No. 92-8346

In The

Supreme Court of the United States

October Term, 1993

TERRY LEE SHANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

The Absence of Language in IDRA Specifically Authorizing the Use of the Requested Instruction Does Not Determine the Issue in this Case.

The Government points out that the IDRA made a number of changes in the federal insanity defense but emphasizes that Congress included no language in the text of the IDRA which would require the granting of the requested instruction. The absence of the language, the Government suggests, answers the question of whether Congress intended to adopt the practice of the D.C. Circuit – if Congress had intended by IDRA to change the practice which prevailed in all circuits but the District of Columbia, it would have said so explicitly.

The Court rejected a similar argument in *Metropolitan R.R. Co. v. Moore*, 121 U.S. 558, 30 L.Ed. 1022, 7 S.Ct. 1334 (1887). The Court considered whether an appeal from the special term of the Supreme Court of the District of Columbia would lie to the general term of the same court on the ground that the verdict was against the weight of the evidence, or whether the determination of that issue was lodged solely in the discretion of the trial judge, thereby foreclosing an appeal of the issue. The question turned on the interpretation of an act of March 3, 1863, which adopted a code of procedure modeled on the procedure of the State of New York. In holding that it had no jurisdiction to consider the appeal, the lower court had abided by a decision of the Supreme Court of the District of Columbia which had rejected the application of New York precedent and instead had interpreted the statutory procedure in light of existing precedent in the District of

Columbia and the State of Maryland, to which the courts of the District traditionally looked for authority:

> "This well settled practice [holding that no appeal could lie in such a case], existing here when the act of March 3, 1863, was passed, should only be considered as changed by that act to the extent clearly indicated by its terms . . . . '[I]t is a safe rule to apply the former practice and interpret the obscurities and deficiencies of the code by the light of that practice.' "

121 U.S. at 571.

In rejecting the position just quoted, the Court held that the enactment of a new scheme of procedure substantially adopted from a New York statute required that the issue be determined in light of the decisions of New York as they existed at the time of the adoption of the Act of March 3, 1863, rather than the precedents of Maryland and the Supreme Court of the United States interpreting the former procedure in the District.

The Legislative History is Important in Determining Congressional Intent in this Case and Confirms Congress Used §24-310 as its Model for IDRA.

The Government attacks Petitioner's reliance on the legislative history, contending that it is useless in answering the question posed in this case. While Petitioner agrees that the legislative history "cannot serve as an independent source having the force of law," (Government's Brief, p. 10), it is nevertheless an important and appropriate resource to determine if, and to what extent,

Congress intended to adopt the practice of the D.C. Circuit in regard to the instruction at issue. *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958).

The Government also contends IDRA resembles certain unspecified state statutes whose highest courts do not require such an instruction as much as it resembles D.C. Code §24-310; hence, "it is no less plausible to conclude that Congress intended to incorporate those courts' construction of their statutes, rather than the D.C. Circuit's gloss on the D.C. Code provision in *Lyles*." (footnote omitted). (Government's Brief, p. 13).

The problem with the Government's argument is that the only statute referred to in the legislative history is the D.C. Code. There are no references to any similar state statutes and no suggestion that any such statutes were studied or considered in drafting the legislation.

The legislative history repeatedly refers to D.C. Code §24-310. Referring to a part of the IDRA (18 U.S.C. §4243), the Senate Report states, "The requirements of subsections (a) through (c) are similar to the most recent pronouncement of Congress in this area, the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970." (The D.C. Act referred to is found at 84 Stat. 590 and in part amended D.C. Code §24-310.) Senate Report No. 98-225, 98th Cong., 1st Session 240, 241, reprinted 1984 U.S. Code Cong. & Adm. News 3182. In addition to the references to the D.C. Code cited in Petitioner's initial brief and at page 12 of the Government's brief, the Senate Report also refers to the D.C. statute on the insanity defense in text at pages 222, 238, 242, and 243, and in a footnote on page 243 (n. 63). All of these references support the inference that the D.C. Code was the model for IDRA.

The Government relies heavily on the differences between D.C. Code §24-310 and IDRA in arguing that even if §24-310 was the model, the changes are so substantial that the rule requiring adoption of the settled judicial construction placed on the model statute is not applicable. While there are differences, nothing in the statutory language suggests that Congress was disavowing the practice in the D.C. Circuit of granting the instruction at issue, and nothing in the statute is inconsistent with the employment of such a practice. The mere fact that there are differences does not alter the adoption of the settled judicial construction of the District of Columbia where it is evident that the D.C. Act was the model. *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, 42 L.Ed. 752, 18 S.Ct. 347 (1898).

Empirical Studies of Juror Conduct in Insanity Cases Support the View that Juries are Concerned About the Disposition of the Defendant in the Event of an NGI Verdict, but Such Studies are Few and Imprecise.

The Government cites a number of studies to the effect that the instruction is not needed because most jurors already know that the defendant will be committed in the event an NGI verdict is rendered. (Government's Brief, pp. 14-15). The results of empirical studies are not as evident and uncomplicated as the Government suggests. ABA Standards for Criminal Justice 7-6.8 (2d ed. 1986 Supp.) (The commentary following Standard 7-6.8 notes that studies on the issue are contradictory and endorses the granting of the instruction).

One of the studies cited by the Government involved a survey mailed to the members of 10 actual juries which

had sat on trials involving an insanity defense.[1] Some of the trials had taken place as much as 4 years earlier. Responses were received from slightly less than 50% of the jury members. Different members of the same jury frequently gave contradictory answers as to what had taken place in their deliberations. The authors expressed reservations about how accurate their respondents' memories were. However, at least one juror on 8 of the 10 panels recalled that the jury had discussed what would happen to the defendant in the event of an NGI verdict. The article concluded that the jury ought to be instructed on the disposition to be made of the defendant in the event of an NGI verdict if the defendant requested the instruction, or if the defendant did not object. The article advocates substantially the same result as requested by Petitioner in this case.

Another of the studies cited by the Government involved experimental juries impanelled for the purpose of the survey.[2] No real consequences hung on their decisions, and this alone casts grave doubt on the reliability and applicability of the data to actual jury deliberations. Despite Dr. Simon's opinion that most jurors know that the defendant will be committed in the event of an NGI verdict, she concludes:

> "[I]t would be a useful precaution to include such an instruction under all circumstances and not leave it to the common sense of

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[1] G.H. Morris, et al., *Whither Thou Goest? An Inquiry Into Jurors' Perceptions of the Consequences of a Successful Insanity Defense*, 14 San Diego L. Rev. 1058 (1977).

[2] R. Simon, *The Jury and the Defense of Insanity* (1967).

the jury. On occasion it can do some good and it can never do any harm." R. Simon at p. 96.

Another of the Government's authorities notes that even if most jurors correctly assume that a defendant found NGI will be committed, some jurors may still wrongly assume that the defendant will be released.[3] It points out that even those who assume that commitment will result may nevertheless harbor uncertainty. In either of these eventualities, the jury deliberation may be tainted. The article concludes that an instruction similar to that advocated by Petitioner ought to be granted.[4]

In H. Weihofen, *The Urge to Punish: New Approaches to the Problem of Mental Irresponsibility* (1956, reprinted 1979), at page 120-21, the author comments on the preliminary statistics compiled by the University of Chicago Jury Project regarding deliberations in insanity cases by experimental juries. He states that not a single jury failed to discuss what would happen to the defendant if he were

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[3] Note, *Federal Jury Instructions and the Consequences of a Successful Insanity Defense*, 93 Colum. L. Rev. 1223, 1241 n. 91.

[4] The article advocates that the following instruction be granted:

> "If you find [the defendant] not guilty by reason of insanity, the law requires that [he/she] be committed to a suitable facility until such time, if ever, that the Court finds [he/she] may safely be released back into the community.
>
> This information is given to you so that you will not speculate about what will happen to [the defendant] if found not guilty by reason of insanity. You are not to consider it in determining whether or not [the defendant] is guilty, not guilty, or not guilty by reason of insanity." 93 Colum. L. Rev. at p. 1246.

acquitted on the ground of insanity. He observes that, "many jurors who were somewhat disposed to a verdict of insanity were brought over to a guilty verdict by the argument that if declared insane the defendant would go 'scot free' ".

More persuasive than academic investigations are actual cases where defendants requested and were refused the instruction, and juries convicted, apparently at least in part out of fear that the defendant might be released if found not guilty by reason of insanity. See, *United States v. Frank*, 956 F.2d 872, 882 (9th Cir. 1992), (Hug, C.J. concurring in part and dissenting in part), *cert. den.*, 113 S.Ct. 363 (1992); *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976); *Commonwealth v. Mutina*, 366 Mass. 810, 323 N.E.2d 294 (1975).

CONCLUSION

Petitioner renews its request that the judgment be reversed and the matter remanded for a new trial.

Respectfully submitted,

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